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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1071

ALEX RINKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 325–328) is reported at 147 F. 2d 1.

JURISDICTION

The judgment of the circuit court of appeals was entered January 24, 1945 (R. 329), and a petition for rehearing was denied February 21, 1945 (R. 330). The petition for a writ of certiorari was filed March 23, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether petitioner may challenge the propriety of his Selective Service classification as a defense in his criminal trial for refusing to comply with the instructions of officials at the induction center and for refusing to submit to induction.

STATUTE AND REGULATIONS INVOLVED

Section 11 of the Selective Training and Service Act of 1940 and the applicable provisions of the Selective Service Regulations are set forth in Appendix A, *infra*, pp. 12–14.

STATEMENT

On June 30, 1944, petitioner was indicted in the United States District Court for the Northern District of Illinois in three counts charging violations of the Selective Training and Service Act of 1940 (R. 2–5). Count 1 charged that he wilfully failed to report for induction into the armed forces; count 2, that he wilfully failed to obey the orders of representatives of the armed forces at the induction station; and count 3, that he wilfully failed to submit to induction. Having waived a trial by jury (R. 11–12), petitioner was tried by the court and was convicted on counts 2 and 3 (R. 157). Imposition of sentence was suspended and petitioner was placed on probation for two years (R. 296–297). Upon appeal to the Circuit

Court of Appeals for the Seventh Circuit, the judgment was affirmed (R. 329).

At this trial petitioner sought to predicate his defense on the contention that, as a Jehovah's Witness, he was a minister of religion and that he had been improperly denied classification as such. The district court, relying on *Falbo* v. *United States,* 320 U. S. 549, permitted petitioner to make an offer of proof, but declined to receive the proposed evidence on the ground that the propriety of petitioner's Selective Service classification could not be challenged in the criminal trial (R. 81–82, 155–156). The evidence in support of the judgment may be briefly summarized as follows:

Petitioner, a citizen of the United States (R. 164), registered under the Selective Training and Service Act of 1940 on October 16, 1940, with Local Board No. 122, Chicago, Illinois (R. 16). He executed his Selective Service questionnaire on March 26, 1941 (R. 162–168). In his questionnaire, petitioner stated that he was born November 10, 1909 (R. 164); that his education consisted of eight years of elementary school and four years of high school (R. 162); that he was married and had no children (R. 164); that he had been a "minister" of the Watchtower Bible and Tract Society since November 22, 1932, the date of his ordination (R. 164); that his occupation was preaching the Gospel of God's Kingdom

from house to house (R. 163); that he had worked as an armature winder from 1927 to 1939 (R. 163); and that he was a conscientious objector to both combatant and noncombatant military service (R. 165). After having been classified and reclassified on several occasions, petitioner was classified I–A–O (available for noncombatant military service) by his local board on April 26, 1943 (R. 19, 167). He appealed to his board of appeal and was unanimously classified I–A by that board (R. 19), after he had advised the board that he would refuse a conscientious objector's classification and would accept only a classification as a minister of religion (R. 216). Upon complaint by petitioner that he had been improperly classified by the board of appeal, his file was forwarded to the National Headquarters of the Selective Service System. That office reviewed petitioner's file and concluded that "further action on this case by National Headquarters is not deemed necessary in the national interest nor to avoid an injustice." (R. 221.) Petitioner thereafter reported for a pre-induction physical examination as directed by the order of his local board, and he was found physically acceptable by the armed forces (R. 19–20, 223). On April 3, 1944, he was ordered to report for induction on April 13, 1944 (R. 20). On the morning of April 13 petitioner reported to his local board and gave the clerk a letter stating in substance that he refused to be inducted

into the armed forces (R. 20, 225). Together with other prospective inductees, he was transported to Fort Sheridan, Illinois, the induction station (see R. 20).

The events at the induction station were shown by the testimony of Major Bellis, who was the commanding officer of the induction station when petitioner appeared there. The Major described the various steps preliminary to induction which selectees were required to take to enable the Army finally to determine their acceptability and induct them. He testified that there were various stations at the induction center to which a selectee was required successively to report to obtain materials, to furnish information, to undergo a physical inspection, to be blood-typed, to assist in making up his roster, to furnish information for filling out a form for the local board, and to be fingerprinted. Thereafter, if the selectee was accepted, he was taken to the ceremonial room where the induction ceremony was had. (R. 30–32.)

Petitioner proceeded to undergo this processing, but when he reached the station where Section 3 of Selective Service Form 221 was to be completed, he refused to participate in the processing any further. Major Bellis testified that a selectee who would not furnish the data required in completing that form "definitely" would not be acceptable to the Army. (R. 32–34.) At this point

there remained three additional stations before the processing would have been completed (R. 34–35). Petitioner was thereupon taken to Major Bellis' office, and he told the Major that he had been improperly classified by his local board and that he refused to go further in the line. The sanctions of the Selective Training and Service Act were explained to petitioner, but he advised the Major that he still refused to proceed with the processing. He was requested to make a written statement to this effect, which he did, stating that he refused to be inducted into the armed forces because he was a minister of religion. (R. 34–35, 38, 229.) Major Bellis then directed petitioner to report back to his local board (R. 51); petitioner did not do so (R. 23).

ARGUMENT

1. Petitioner principally contends (Pet. 17–20, 25–34) that the trial court erred in refusing to review the propriety of his Selective Service classification in his criminal trial. The contention rests upon his assumption that a selectee who refuses to complete the induction process, but whose acceptability for service has been finally determined, is entitled collaterally to attack his Selective Service classification as a defense in a criminal prosecution for failing to perform the duties required of him under the Act and regulations. In our view, and in the view of the lower federal courts which have passed upon this ques-

tion, the rationale of this Court's decision in *Falbo* v. *United States,* 320 U. S. 549, precludes such an argument.[1] Rather, a selectee is required to complete the process, including induction, and to raise then any constitutional objections to his induction by resort to habeas corpus.[2] See *United States* v. *Flakowicz,* 146 F. 2d 874 (C. C. A. 2), petition for certiorari pending, No. 1072; *Sirski* v. *United States,* 145 F. 2d 749 (C. C. A. 1); *Biron* v. *Collins,* 145 F. 2d 758 (C. C. A. 5); *Klopp* v. *United States,* No. 9803, decided March 26, 1945 (C. C. A. 6); *Fijii* v. *United States,* No. 2973, decided March 12, 1945 (C. C. A. 10). The Government's position is well stated in a recent opinion by Judge Parker speaking for the Circuit Court of Appeals for the Fourth Circuit in *Smith* v. *United States,* No. 5329, decided April 4, 1945, a copy of which is attached hereto as Appendix B, *infra,* pp. 15–25.

The excerpts from *Billings* v. *Truesdell,* 321 U. S. 542, relied upon by petitioner do not limit the *Falbo* case in the manner suggested. In the

[1] See also the concurring opinion of Mr. Justice Douglas in *Hirabayashi* v. *United States,* 320 U. S. 81, 108–109.

[2] That habeas corpus is an effective remedy is illustrated by *United States ex rel. Reel* v. *Badt,* 141 F. 2d 845 (C. C. A. 2); *United States ex rel. Lynn* v. *Downer,* 140 F. 2d 397 (C. C. A. 2), certiorari denied, 322 U. S. 756; *United States ex rel. Phillips* v. *Downer,* 135 F. 2d 521 (C. C. A. 2); *Benesch* v. *Underwood,* 132 F. 2d 430 (C. C. A. 6); *Harris* v. *Ross,* 146 F. 2d 355 (C. C. A. 5); *Application of Greenberg,* 39 F. Supp. 13 (D. N. J.); *United States ex rel. Bayly* v. *Reckord,* 51 F. Supp. 507 (D. Md.).

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Billings case the Court was concerned with whether a person finally accepted for military service, but who refused to be inducted, was subject to military or civilian jurisdiction. The decision that he was subject to the latter did not enlarge the authority of the civilian criminal court to inquire into the propriety of the Selective Service classification.[3]

2. Even if we assume, *arguendo*, that after a selectee's acceptability to the Army has been finally determined the propriety of his Selective Service classification may be collaterally challenged in a criminal prosecution, we submit that petitioner had not been finally determined to be acceptable at the time when he refused to complete the process at the induction station, and that he therefore has not brought himself within the rule for which he contends.

The question presented is one of fact, whether petitioner completed the Selective Service process short of induction and was found acceptable by

[3] In this connection, the court below said (R. 328):

"* * * The Billings case decided one question only and that was that the army did not have jurisdiction over Billings until he had been "actually inducted," and in that case although the process had gone much farther than in the present case, yet he had not been inducted within the meaning of the Act and was, therefore, not subject to a trial by the army. We think it clear that the Supreme Court did not intend in the Billings case to modify or enlarge upon the Falbo decision which specifically holds that the defense here urged could not be considered by a court in the trial of a criminal indictment brought for violation of the selective service process."

the Army. In this respect it may be noted that petitioner was required to undergo substantially the same processing as was Falbo. Both were given pre-induction physical examinations, which they passed. Thereafter, petitioner was ordered to report for induction; Falbo was ordered to report for work of national importance. Falbo still had to be accepted by the Civilian Public Service Camp to which he was assigned, and petitioner still had to be accepted at the induction station.[4] Major Bellis, who was the commanding officer at the induction station to which petitioner was ordered to report, testified (R. 30–32) that there were various stations at the induction center to which petitioner was required to go for processing and that only after he had completed all these steps would he have been acceptable for actual induction. As we have shown (*supra,* pp. 5–6), petitioner withdrew from the processing before it was completed. Among the questions which petitioner was yet required to answer, at the point in the process when he withdrew, was one concerning prior military service (R. 31). For example, if the information obtained at that point disclosed that petitioner previously had been dishonorably discharged from the Army or that he had been discharged because he was inapt, he probably would have been unacceptable to the Army. See Army

[4] The procedure at the time that Falbo was being processed is set forth at pp. 44, 56 of the Brief for the United States in that case (No. 73, October Term, 1943).

Regulations 615–500, Section 13 (b) (2) and (c) (1), which provide that in most instances such a person shall not be inducted; see also R. 36. Major Bellis testified that without furnishing the induction officials this data required of him, petitioner was not acceptable to the Army (R. 33–34). Petitioner not only did not do this, but he also failed to complete the last three steps in the process, short of induction (R. 35). Major Bellis testified categorically that petitioner had not been accepted by the Army (R. 37). By his conduct petitioner has thus placed himself in a position where his acceptability to the Army has not yet been finally determined. This being so, he has not, even under his view of the law, completed the selective process and therefore was not entitled to attack his Selective Service classification in his criminal trial. In this respect, his position is no different than Falbo's.

3. As the petition for a writ of certiorari states (Pet. 35–37), the other contentions which petitioner mentions but does not argue have been previously urged either in the *Falbo* case or on petitions for writs of certiorari in *Lohrberg* v. *Nicholson,* No. 884, and *Clayton* v. *United States,* No. 886, October Term, 1943, certiorari denied, 322 U. S. 744–745. The Government's views in

opposition are fully stated in our briefs in those cases.[5]

CONCLUSION

Petitioner was not entitled to attack his Selective Service classification in his criminal trial. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1945.

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[5] In evaluating petitioner's contention it may be noted that petitioner was finally classified I–A by his board of appeal on a *de novo* consideration of his case, after he had specifically declined exemption as a conscientious objector. Since the board of appeal, not the local board, was the final classifying agency, petitioner had no standing to complain unless he could show that the board of appeal acted arbitrarily in classifying him. See *Bowles* v. *United States*, 319 U. S. 33; *Falbo* v. *United States*, 320 U. S. 549, 555 (concurring opinion). His grievance as to the board of appeal was not as to its procedure but as to its decisions with respect to the admission and weight of the evidence.